

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS FREDERICK MCGINN, II,

Defendant-Appellant.

UNPUBLISHED

January 24, 2006

No. 256407

Calhoun Circuit Court

LC No. 01-004223-FC

Before: Donofrio, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court¹ for consideration as on leave granted. Defendant appeals his sentence and the trial court's order denying his motion to withdraw his plea. Because defendant did not enter into his no contest plea agreement understandingly and voluntarily, we vacate the trial court's order denying defendant's motion to withdraw his plea, vacate defendant's sentence, and remand the cause to the trial court.

This case arose out of allegations that defendant stole a vehicle and, while driving this vehicle with passenger, engaged in a high-speed chase with the police. Ultimately, defendant crashed the stolen vehicle killing the passenger. Defendant was charged with second-degree murder, MCL 750.317, first-degree fleeing and eluding, MCL 750.479a(5), and unlawful driving away of a motor vehicle, MCL 750.413.

At a plea entry hearing, defense counsel stated that defendant accepted an offer to plead no contest to the second-degree murder charge "with a sentence of Life with Parole" and the other two charges would be dismissed. The agreement also included the dismissal of two other pending cases and an agreement that the prosecutor would not issue any other charges for incidents occurring before the incident giving rise to this case. At the hearing, the prosecutor stated that defendant had chosen to be sentenced to life imprisonment rather than a term of years because "his review for parole would come up in ten years, as opposed to a term of years[,] [w]hich he would have to serve every day of before his review." Defense counsel agreed that defendant wished to be sentenced to a life term rather than to a term of years for the parole-

¹ 470 Mich 884 (2004).

related reasons stated by the prosecutor. After discussion, the trial court restated the second-degree murder charge and also stated, “[t]he potential penalty is up to Life or any term of years, do you understand that?” Defendant communicated that he understood, and then offered his no contest plea. Before formally accepting the plea, the following exchange took place between the court, counsel and defendant:

[*The court*]: Either attorney aware of any promises, threats or inducements not disclosed on the record concerning the entry of the plea?

Prosecution?

[*Prosecutor*]: Your Honor, the only thing I would ask, is in discussions with defense counsel, we discussed a plea to Second Degree Murder with the options of either entering an agreement to a Life sentence or a term of years. And that was discussed. The pro’s [sic] and con’s [sic] were discussed between myself and defense counsel.

She had indicated she would talk to her client about that. And it’s my understanding he chose the Life sentence, because *his review for parole would come up in ten years*, as opposed to a term of years. Which he would have to serve every day of before his review.

I simply would like that clarified and acknowledged by the defense counsel and the Defendant that it is his choice. There was discussion of a term-of-years sentence, but it was his choice to choose the Life sentence.

[*The Court*]: Okay. And is that accurate?

[*Defense Counsel*]: That’s accurate.

[*The Court*]: You discussed this with your client, and that’s--

[*Defense Counsel*]: I did, Your Honor.

[*The Court*]: --his decision.

[*Defense Counsel*]: Yes, Your Honor. Based on my discussions with [the prosecutor] in terms of the Guidelines scoring, that a term of years does exceed the *ten-year—ah—option for [defendant] to come up to the Parole Board for review*.

[*The Court*]: All right. And I take it you have had discussions with your counsel concerning this agreement?

[*Defendant*]: Yes.

[*The Court*]: And you’ve already indicated that this is your understanding of the agreement as stated?

[Defendant]: Yes. [Emphasis added.]²

After determining that defendant entered the plea agreement “freely, voluntarily and understandably [sic],” the trial court accepted defendant’s no contest plea and scheduled the matter for sentencing.

At the sentencing hearing, defendant was now represented by different counsel than at the plea agreement hearing. Defense counsel informed the court that defendant wished to withdraw his plea pursuant to MCR 6.310(B). According to defendant’s counsel, defendant had learned that under the agreed-to life sentence, he would not be eligible for parole until he had served fifteen years, rather than ten years. The prosecutor responded that he had not received notice that defendant wished to withdraw the plea, and that the timing of defendant’s eligibility for parole had not been part of the plea agreement. The prosecutor continued to assert that under a life sentence for second-degree murder, defendant would be eligible for review after only ten years.

After considering defendant’s request to withdraw his plea, the trial court proceeded with sentencing, stating that “pursuant to [MCR] 6.310, I just don’t see a basis to permit you to withdraw your plea at this point before sentencing.” The prosecutor then asked the court impose “the plea agreement: and that is that [defendant] be sentenced to life in prison” The court observed that although it could sentence defendant to a term of years, relying on the applicable sentencing guidelines, it would instead sentence defendant “as part of this sentence agreement that [defendant] entered into, that [defendant] serve a term of imprisonment . . . for Life.”

Thereafter, defendant’s appellate counsel filed a motion to withdraw defendant’s plea or in the alternative for resentencing. At oral argument on the matter, defense counsel argued that defendant had not knowingly and understandingly made the plea because it was based on trial counsel’s incorrect advice that under a life sentence defendant would be eligible for parole after ten years and asked the court to allow defendant to withdraw the plea and proceed to trial. Counsel explained that under MCL 791.234(6), individuals sentenced to life imprisonment for second-degree murder could not become eligible for parole until after serving fifteen years. Counsel also argued that even if the court would not allow defendant to withdraw his plea, defendant should be resentenced from life imprisonment to a term of years. Regarding the issue of parole eligibility, the prosecutor continued to assert that inmates sentenced to life imprisonment were eligible for “review” after only ten years.

Subsequently, the court issued a written opinion stating that it would resentence defendant but would not allow defendant to withdraw his plea. That opinion provided in pertinent part:

This Court finds that the Defendant did enter into this plea agreement freely, voluntarily and knowingly. The Defendant indicated that he understood the plea agreement, he agreed with it, and it was his choice to enter the plea to

² It is noteworthy that the prosecution raised the issue of defendant’s potential review before the parole board in response to the court’s inquiry whether there were any promises or inducements supporting the plea offer.

Second Degree Murder to resolve all the pending matters. There was a factual basis to accept the plea.

As a part of the plea agreement, the Defendant chose to be sentenced to life in prison as opposed to a term of years. It is apparent from the transcript that the reason for this choice was [sic] belief of the Defendant and his counsel that he would be eligible for parole consideration (though there was no guarantee that he would be paroled) after 10 years. On the other hand, if he were sentenced to an indeterminate sentence, he would not be eligible for parole review until after he served the minimum sentence, which could have been much higher. (The guideline range at the time of sentencing extended to over 30 years for the minimum sentence).

MCL 791.234(6) states that a defendant sentenced to life on a Second Degree Murder conviction must be interviewed by a member of the Parole Board after serving 10 years. However, the statute goes on to state that the Parole Board does not attain jurisdiction until the defendant has served 15 years. Therefore, pursuant to this statute, the Defendant could not be eligible for parole review until he had served 15 years in prison.

Armed with this information, it is possible that the Defendant would still want to be sentenced to a term of life in prison rather than an indeterminate sentence. However, it is also possible that he may not. Therefore, this Court finds that re-sentencing should occur. This will permit the Defendant to make a more-informed [sic] decision regarding the sentencing options available to him.

The trial court then held a second sentencing hearing, where defendant's appellate counsel argued that the court was required to effectuate the original bargain, which contemplated, albeit incorrectly, parole eligibility after ten years. Defense counsel asserted that the court should resentence defendant to a term of years with a ten-year minimum because this was the only way to give effect to defendant's original belief that he would become eligible for parole after ten years. Counsel further argued that if the court did not enforce the plea agreement in this manner, defendant was entitled to withdraw his plea. The prosecution contended that defendant should be sentenced to a term of years "on or near the top of the Sentencing Guidelines." The trial court then imposed a new sentence of 25 to 40 years, stating as follows:

I'm not going to try to attempt to speculate in terms of what the Parole Board would do, ten years from now, 15 years from now, or 20 years from now, on a life sentence, whether you [defendant] would be in effect paroled or not. Just because you're eligible for a determination. I'm just not gonna [sic] get into that, I guess.

And – I'm certainly not going to sentence you to a term of years with a minimum being ten years in prison, based on some speculation of what a Parole Board might do down the road. In terms of if you had been sentenced to a life term, or whatever. I'm just not gonna [sic] do it.

The Guideline range in this case is from 18 and a half or somewhere thereabouts, to 31 years or somewhere thereabouts. There's no reason from the

facts and circumstances surrounding this offense, or your background and circumstances, which would cause me to deviate from the Guidelines. It just isn't there.

Based on the information that's contained in this [presentence] Report, I'm going to sentence you as follows: I'm going to order that you serve a term of imprisonment within the custody of the Michigan Department of Corrections of not less than 25 years nor more than 40 years, with credit for the time served to this point

Defendant sought leave to appeal to this Court. This Court denied leave. *People v McGinn*, unpublished order of the Court of Appeals, entered December 10, 2003 (Docket No. 251121). Defendant appealed to the Michigan Supreme Court, and in lieu of granting leave to appeal, our Supreme Court remanded the case to us for consideration as on leave granted. *People v McGinn*, 470 Mich 884 (2004).

Defendant argues on appeal that the trial court was required to allow defendant to withdraw his plea before sentencing where he entered the plea based on a misunderstanding. Particularly, defendant contends that the trial court should have allowed him to withdraw his plea because it was based on a material misunderstanding of his eligibility for parole.

We review a trial court's denial of a pre-sentencing motion to withdraw a plea for an abuse of discretion. *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000). Pre-sentencing plea withdrawals are governed by MCR 6.310(B). To withdraw a plea under MCR 6.310(B), a defendant must show "a fair and just reason for withdrawal of the plea." *People v Patmore*, 264 Mich App 139, 149; 693 NW2d (2004). "Doubts regarding substantiation of the reasons for withdrawal are to be resolved in a defendant's favor." *People v Holmes*, 181 Mich App 488, 493; 449 NW2d 917 (1989).

Defendant asserts that the record reflects he pleaded no contest based on the misunderstanding that he would be eligible for parole in ten years. According to defendant, all parties, including defense counsel, the prosecutor, and the trial court, initially agreed that under a life sentence for second-degree murder, defendant would become eligible for parole after only ten years. The record reveals that the prosecutor stated, at the plea entry hearing in defendant's presence, that defendant would be subject to "review" in ten years. Defense counsel too stated that, at ten years, defendant would "come up to the Parole Board for review."³ Both defense counsel and defendant stated on the record that they understood and agreed. However, a clear reading of the record reveals that it was never actually stated on the record that defendant would be eligible for *review only* in ten years but *not for parole* until a period of fifteen years. Moreover, the record reveals that the prosecutor used the term "review" synonymously with the

³ It is clear from the record that defendant and his counsel contemplated review before the entire Parole Board, the result of which could be release on parole, not merely an interview with a single member of the Parole Board that could not result in release on parole.

term “eligibility,” thus suggesting that all parties involved in these proceedings believed defendant would be eligible for parole after ten years.⁴

It is true that prisoners serving a life sentence with the possibility of parole must be interviewed by a member of the Parole Board after ten years. MCL 791.234(6)(a). However, such prisoners do not actually become eligible for release on parole until the conclusion of fifteen years. MCL 791.234(6)(b). Defendant suggests that the misunderstanding of this provision induced him to plead no contest and accept a life sentence with the expectation that he would become eligible for parole after only ten years in prison. Defendant asserts that because his plea was based on a mistaken reading of the law, he was entitled to withdraw it. Our reading of the record confirms defendant’s allegations that he had a mistaken belief regarding the terms of his no contest plea agreement – he believed that he would be eligible for parole, and not simply a review – after serving only ten years. Only after accepting the plea and sentencing agreement did defendant discover that he would not actually become eligible for parole until after he served fifteen years in prison. Accordingly, the sole question before us now is whether defendant’s mistaken belief can form the foundation of a no contest plea agreement.

A no contest plea must be “understanding, voluntary, and accurate.” MCR 6.302(A). A no contest plea is understanding if the defendant is advised of and understands the rights set forth in MCR 6.302(B), is voluntary if the terms of any plea agreement are disclosed and the plea is defendant’s own choice, i.e., it is not tendered under threat or duress, MCR 6.302(C), and is accurate if it is appropriate and evidence supports a finding that the defendant is guilty of the offense charged. MCR 6.302(D)(2). Further, the primary focus of plea bargaining is the determination of sentence duration. *People v Killebrew*, 416 Mich 189, 205; 330 NW2d 834 (1982). In light of these rules, after scrutinizing the record, we conclude that defendant’s mistaken belief cannot form the foundation of an understanding, voluntary, and accurate plea. MCR 6.302(A).

When the trial court acknowledged that defendant was mistaken on the consequences of the results of his no contest plea, and therefore instituted resentencing, the basis of an understanding, voluntary, and accurate plea pursuant to MCR 6.302(A) collapsed. At the sentencing hearing, defendant in allocution advised the court that he had not made an understanding plea because he was under the belief that he would be eligible for parole in ten years which was not the case. And, both at the subsequent motion to withdraw the plea and at defendant’s second sentencing, defendant articulated his unwillingness to be sentenced to either life or the term of years prescribed. Defendant was clear at every step in the process that he was unwilling to tender a no contest plea when the indeterminate sentence was a guidelines sentence;

⁴ Again, when discussing whether there were any promises, threats, or inducements that caused defendant to enter the plea the prosecution stated “it’s my understanding [defendant] chose the Life sentence, because his *review* for parole would come up in ten years, as opposed to a term of years. Which he would have to serve every day of before his *review*.” (Emphasis added.) Because the prosecutor used the term “review” to describe parole eligibility after serving the minimum number of years, defendant had no reason to know that there existed a substantial and material difference between review by the parole board and eligibility for parole.

he was only willing to enter a plea of no contest when he thought he was eligible for parole in ten years.

Ultimately for defendant's plea to be voluntary after the court acknowledged defendant's misconception, the court must afford defendant the alternative to fully withdraw his plea. When the trial court instead merely provided for resentencing after acknowledging defendant's misunderstanding, the new plea agreement remained predicated on defendant's previously articulated harbored misconceptions. As a direct result, both defendant's understanding and voluntariness are drawn into question. With both understanding and voluntariness lacking, plainly, defendant had presented the court with a sufficient basis to withdraw his plea under MCR 6.310.⁵ Hence, we conclude that the trial court erred when it denied defendant's request when it found that defendant had not presented a sufficient basis to withdraw his plea under MCR 6.310. Because the trial court was required to allow defendant to set aside his plea before sentencing, the court abused its discretion.

In light of our disposition of this case, we need not reach the other issues raised by defendant in this appeal. The sentence imposed by the trial court is vacated. We remand to the trial court with instructions to allow defendant to withdraw his plea. If defendant withdraws the plea, the prosecutor may reinstitute all charges. We do not retain jurisdiction.

Reversed and remanded.

/s/ Pat M. Donofrio

/s/ Brian K. Zahra

⁵ At oral argument before us the prosecutor confessed no prejudice resulting from defendant's withdrawal of his plea. MCR 6.310(B).